

**RULES
OF
TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH**

**CHAPTER 0800-1-8
DISCRIMINATION AGAINST EMPLOYEES EXERCISING RIGHTS
UNDER THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1972**

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0800-1-8-.01 PURPOSE. The purpose of this chapter is to set forth what constitutes discrimination under T.C.A. §50-3-409, the procedures to be followed by employees who allege that they have been discriminated against contrary to the provisions of that statute, and the procedures to be followed by the Commissioner of Labor and Workforce Development in investigating and attempting settlement of discrimination complaints, either through voluntary settlement or through litigation.

Authority: T.C.A. §50-3-409. **Administrative History:** Original rule certified March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984.

0800-1-8-.02 DEFINITIONS.

- (1) The definitions set forth in T.C.A. §50-3-106(1), (6), (7) and (8) are applicable to this chapter. In addition, the following terms shall have the meaning ascribed for the purposes of this chapter:
 - (a) “Act” shall mean the Tennessee Occupational Safety and Health Act of 1972 as amended, T.C.A. §§50-3-101 through 50-3-919.
 - (b) “Discrimination” shall mean any disciplinary action, including discharge, taken by an employer against an employee for exercising his or her rights under T.C.A. §§50-3-101 through 50-3-919 and any non-disciplinary action, such as harassment, on or off the job.
 - (c) “Rights” shall mean any right specifically set forth in T.C.A. §§50-3-106 and 50-3-409 and shall include the right of the employee to refuse to perform work under the conditions set forth in Rule 0800-1-8-.04.

Authority: T.C.A. §§50-3-103, 50-3-106, and 50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984.

0800-1-8-.03 UNPROTECTED ACTIVITIES DISTINGUISHED.

- (1) Actions taken by an employer which adversely affect an employee may be predicated upon non-discriminatory grounds. The proscriptions of T.C.A. §50-3-409 apply when the adverse action occurs because the employee has engaged in protected activities. An employee’s engagement in activities protected by the Act does not automatically render him or her immune from discharge or discipline for legitimate reasons, or from adverse actions dictated by non-discriminatory considerations.
- (2) At the same time, to establish a violation of T.C.A. §50-3-409, the employee’s engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If

(Rule 0800-1-8-.03, continued)

protected activity was a substantial reason for the action, or if discharge or other adverse action would not have taken place but for engagement in protected activity, T.C.A. §50-3-409 has been violated. Ultimately, the issue as to whether a discharge or disciplinary action was because of protected activity will have to be determined on the basis of the facts in the particular case.

Authority: T.C.A. §§4-3-1411, 50-3-201, and 50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984. Amendment filed September 22, 1988; effective December 28, 1988. Amendment filed September 7, 2004; effective January 28, 2005.

0800-1-8-.04 EXERCISE OF ANY RIGHT AFFORDED BY THE ACT.

- (1) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, T.C.A. §50-3-409 also protects employees from discrimination occurring because of the exercise “of any right afforded by this chapter” (Chapter 3 of Title 50, T.C.A.). Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (T.C.A. §50-3-307(b)). Certain other rights exist by necessary implication. For example, employees may request information from the Division of Occupational Safety and Health, Department of Labor and Workforce Development, such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Commissioner of Labor and Workforce Development in the course of inspections or investigations conducted pursuant to the Act could not subsequently be discriminated against because of their cooperation.
- (2) On the other hand, review of the Act and the Federal Occupational Safety and Health Act of 1970 (29 USC 650-683, P.L. 91-596, after which the Act was patterned) and examination of the legislative history of each, discloses that, as a general matter, there is no right afforded by either the State or Federal Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act or standards promulgated pursuant thereto will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is a dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to T.C.A. §50-3-409, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of T.C.A. §50-3-409 by taking action to discipline an employee for refusing to perform normal job activities because alleged safety or health hazards.
- (3) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination provided:
 - (a) the condition causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury;
 - (b) that a reasonable person would conclude that, due to the urgency of the situation previously concluded to pose a real danger of death or serious injury, there is insufficient time to eliminate the danger through resort to regular statutory enforcement channels provided by T.C.A. §§50-3-304 and 50-3-918; and
 - (c) the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition upon which his apprehension of death or injury is predicated.

(Rule 0800-1-8-.04, continued)

Authority: T.C.A. §§50-3-304, 50-3-409, and 50-3-918. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984. Amendment filed October 19, 1992; effective January 28, 1993.

0800-1-8-.05 EMPLOYEE REFUSAL TO COMPLY WITH SAFETY AND HEALTH RULES. Employees who refuse to comply with occupational safety and health standards or valid safety and/or health rules implemented by the employer in furtherance of the Act are not exercising any right afforded by the Act and are themselves violating the provisions of the Act (T.C.A. §50-3-106). Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety and health rules and regulations, will not ordinarily be regarded as discriminatory action prohibited by T.C.A. §50-3-409. This situation is distinguished from refusals to work as set forth in Rule 0800-1-8-.04(2) and (3).

Authority: T.C.A. §§50-3-106 and 50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984. Amendment filed October 19, 1992; effective January 28, 1993.

0800-1-8-.06 FILING OF COMPLAINT ALLEGING DISCRIMINATION.

- (1) Who may file. A complaint alleging discrimination in violation of T.C.A. §50-3-409 may be filed by the employee against whom the discriminatory action was taken, or by a representative authorized to do so on his behalf.
- (2) Nature of filing. No particular form of complaint is required. Complaints reduced to writing are preferable but verbal or telephone complaints shall be accepted. As a minimum, the following must be provided in the complaint:
 - (a) Name and address of the complainant or the complainant's authorized representative.
 - (b) Name and address of the employer or former employer against whom the complaint is filed.
- (3) Place of filing. Complaints should be filed with the Area Supervisor of the Division of Occupational Safety and Health responsible for enforcement activities in the geographical area where the complainant resides or is/was employed or with the Manager of Standards and Procedures or Health or Safety Enforcement in the Central Office of the Division of Occupational Safety and Health in Nashville. Such complaints addressed to the Commissioner of Labor and Workforce Development will be forwarded to the Division of Occupational Safety and Health for action.
- (4) Time for filing.
 - (a) T.C.A. §50-3-409 provides that any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty (30) days after such violation occurs, file a complaint with the Commissioner of Labor and Workforce Development alleging such discrimination.
 - (b) A major purpose of the thirty (30) day period in which to file a complaint pursuant to T.C.A. §50-3-409 is to allow the Commissioner to decline to entertain complaints which have become stale. Accordingly, complaints not filed within thirty (30) days of an alleged discriminatory action will ordinarily be presumed to be untimely and no further action on them will be taken except to so inform the complainant.
 - (c) However, there may be circumstances which would justify tolling the thirty (30) day period on recognized equitable principles or because of strongly extenuating circumstances, e.g., where the employer has concealed or misled the employee regarding the grounds for discharge or other

(Rule 0800-1-8-.06, continued)

adverse action; where the employee has within the thirty (30) day period, resorted in good faith to grievance - arbitration proceedings under a collective bargaining agreement or filed a complaint regarding the same general subject with another state or federal agency; or where the discrimination is in the nature of a continuing violation. In the absence of submission of reasonable proof of circumstances justifying the tolling of the thirty (30) day period within ten (10) days of being requested and barring requests for extension of time in which to obtain such proof, the complaint shall be deemed untimely filed and shall not be processed.

Authority: T.C.A. §50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984.

0800-1-8-.07 PROCEDURAL ACTION ON T.C.A. §50-3-409 COMPLAINTS.

- (1) All complaints alleging violation of T.C.A. §50-3-409, regardless of where or how received, shall be referred to the “T.C.A. §50-3-409 Operations Review Officer (ORO)” designated by the Administrator, Division of Occupational Safety and Health, who shall log receipt of the complaint and establish a case file.
- (2) The ORO shall, by letter addressed to the complainant, acknowledge receipt of the complaint and:
 - (a) If the complaint is timely filed, provide the complainant with a “Discrimination Questionnaire” and a pre-addressed postage paid envelope for its return within ten (10) days. The Area Supervisor or Enforcement Branch Chief receiving the complaint may provide the complainant with the questionnaire and return envelope.
 - (b) If the complaint is untimely filed, advise the complainant of this fact and that the time for filing may be extended upon submission of documentation of extenuating circumstances such as set forth in Rule 0800-1-8-.06(4)(c) and that failure to submit such documentation within an additional thirty (30) days will result in administrative dismissal of the complaint.
 - (c) That failure to cooperate with the investigator assigned to the case or other personnel of the State acting to bring the case to an equitable close may result in administrative dismissal of the case.
- (3) Upon receipt of the “Discrimination Questionnaire” from the complainant, a determination shall be made to investigate the complaint, or to dismiss it. If dismissed, the complainant shall be informed in writing of the reasons therefore.
- (4) Upon completion of an investigation, all evidence obtained shall be reviewed and a determination made whether or not to litigate the case on behalf of the complainant. If it is determined that litigation is not warranted, the complainant shall be informed in writing of the reasons therefore.
- (5) The complainant shall be advised of any dismissal of the case or of a determination to litigate within ninety (90) days of the receipt of the complaint. However, there may be circumstances when a decision to dismiss or litigate or attempt other settlement action can not be made within the ninety (90) day period. When such circumstances occur, the complainant shall be informed in writing, no later than ninety(90) days following receipt of the complaint, of the current status of the case and when further action may be expected.

Authority: T.C.A. §50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984.

0800-1-8-.08 ARBITRATION OR OTHER AGENCY PROCEEDINGS.

- (1) Any employee who files a complaint pursuant to T.C.A. §50-3-409 may also pursue remedies under grievance arbitration proceedings in collective bargaining agreement or may concurrently resort to other state or federal agencies for relief such as the Department of Employment Security, National Labor Relations Board, Equal Employment Opportunity Commission, Wage and Hour Administration, etc. The Commissioner's jurisdiction to entertain T.C.A. §50-3-409 complaints, to investigate and to determine whether discrimination has occurred, is independent to the jurisdiction of other agencies or bodies. The Commissioner may file in the appropriate chancery court regardless of the pendency of other proceedings. However, the Commissioner also recognizes the policy of favoring voluntary resolution of disputes under procedures in collective bargaining agreements. By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to T.C.A. §50-3-409. Where a complainant is in fact pursuing remedies other than those provided by T.C.A. §50-3-409, postponement of the Commissioner's determination and deferral to the results of such proceedings may be in order.
- (2) Postponement of determination. Postponement of determination would be justified where the rights asserted in other proceedings are substantially the same as rights under T.C.A. §50-3-409 and those proceedings are not likely to violate the rights guaranteed by T.C.A. §50-3-409. The factual issues in such proceedings must be substantially the same as those raised by the complaint filed pursuant to T.C.A. §50-3-409, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.
- (3) Deferral to outcome of other proceedings. A determination to defer to the outcome of other proceedings initiated by a complainant must necessarily be made on a case-by-case basis after careful scrutiny of all available information. Before deferring to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act. In this regard, if such other actions initiated by a complainant are dismissed without adjudicatory hearing thereof, such dismissal will not ordinarily be regarded as determinative of the complaint filed pursuant to T.C.A. §50-3-409.

Authority: T.C.A. §50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984.

0800-1-8-.09 VOLUNTARY SETTLEMENT OF COMPLAINT.

- (1) The Commissioner of Labor and Workforce Development recognizes that voluntary settlement of disputes is preferable to those mandated by a court of law or equity. Voluntary settlement of complaints submitted pursuant to T.C.A. §50-3-409 is encouraged.
- (2) Any person designated by the Commissioner to investigate or process complaints submitted pursuant to T.C.A. §50-3-409 is authorized to attempt to obtain a voluntary settlement of the complaint at any stage of the investigation or review process.
- (3) Voluntary settlements of complaints submitted pursuant to T.C.A. §50-3-409 shall:
 - (a) Be reduced to writing with a minimum of three (3) copies, one (1) for the complainant, one (1) for the respondent, and one (1) for the case file maintained by the Division of Occupational Safety and Health.
 - (b) Clearly set forth the terms of the settlement.
 - (c) Request withdrawal of the complaint upon completion of the terms of the settlement.

(Rule 0800-1-8-.09, continued)

- (d) Be signed by the complainant, the respondent, and/or the authorized representative of either or both, and be witnessed by a person designated by the Commissioner to investigate or process discrimination complaints.
- (4) A copy of all settlement agreements shall be included in the discrimination case file.

Authority: T.C.A. §50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984.

0800-1-8-.10 WITHDRAWAL OF COMPLAINT. Enforcement of the provisions of T.C.A. §50-3-409 is not only a matter of protecting rights of individual employees, but also of public interest. Attempts by an employee to withdraw a previously filed complaint will not necessarily result in termination of the Commissioner's investigation. The Commissioner's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the complainant. However, a voluntary and uncoerced request from a complainant to withdraw the complaint will be given careful consideration and substantial weight as a matter of policy and sound enforcement procedure. Withdrawals requested as a item of voluntary settlement agreements shall be accepted.

Authority: T.C.A. §50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984.

0800-1-8-.11 TERMS OF SETTLEMENTS.

- (1) The Commissioner of Labor and Workforce Development shall endeavor to have the following terms included in any and all voluntary settlement agreements made pursuant to Rule 0800-1-8-.09 and any and all orders issued by an appropriate chancery court or court of appeals adjudicating action filed by the Commissioner with regard to complaints submitted pursuant to T.C.A. §50-3-409;
 - (a) Rehiring or reinstatement of the complainant with full seniority benefits, if so desired by said complainant.
 - (b) Payment of wages lost to the complainant as a result of the discriminatory action. The amount of said wages shall be equitable to both the complainant and respondent and shall only be in the amount actually lost by the complainant.
 - (c) Removal from the complainant's personnel records of all information with regard to the discriminatory action whether or not rehiring or reinstatement is desired by the complainant.
 - (d) Publication of a notice to all employees by the employer that he will refrain from all future discriminatory action against an employee because such employee exercised his rights under the Act.

Authority: T.C.A. §50-3-409. **Administrative History:** Original rule filed March 3;1983; effective June 15, 1983. Amendment filed November 25, 1983; effective February 13, 1984.

0800-1-8-.12 APPEALS OF DECISIONS OR DETERMINATIONS.

- (1) Decisions and/or determinations made regarding cases in which a violation of T.C.A. §50-3-409 is alleged are not ordinarily made by the Commissioner of Labor and Workforce Development personally. The authority and responsibility for making such decisions and/or determinations has been delegated to the Department of Labor and Workforce Development Staff Attorney and to designated personnel of the Division of Occupational Safety and Health.
- (2) If a decision or determination rendered by the Staff Attorney or designated person of the Division of Occupational Safety and Health in cases involving alleged violation of T.C.A. §50-3-409 (e.g.,

(Rule 0800-1-8-.12, continued)

determination that complaint was not timely filed or decision to administratively close the case was not timely filed or decision to administratively close the case because of no response or cooperation from the complainant) is not acceptable to a complainant, he or she may appeal such decision or determination to the Commissioner of Labor and Workforce Development within ten (10) days of its receipt. All decisions or determinations personally rendered by the Commissioner of Labor and Workforce Development upon appeal shall be deemed final and not subject to further appeal.

Authority: T.C.A. §50-3-409. **Administrative History:** Original rule filed March 31, 1983; effective June 15, 1983. Amendment filed November, 25, 1983; effective February 13, 1984.